

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE )  
SUBSTANTIAL DEVELOPMENT PERMIT )  
ISSUED BY THE CITY OF BOTHELL )  
TO THE CALLISON PARTNERSHIP, )  
 )  
SAVE A VALUABLE ENVIRONMENT )  
("SAVE") , a Washington nonprofit )  
corporation, )  
 )  
Appellant, )  
 )  
v. )  
 )  
CITY OF BOTHELL and NORTHCREEK )  
ASSOCIATES, )  
 )  
Respondents. )  
\_\_\_\_\_ )

SHB No. 85-39

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

THIS MATTER, a request for review of a Shorelines Substantial Development Permit issued by the City of Bothell to the Callison Partnership, came on for hearing before the Shorelines Hearings Board, Lawrence J. Faulk, Chairman, Gayle Rothrock, Rodney Kerslake, Nancy Burnett, and Cynthia Sullivan, Members, convened at both Lacey and Bothell, Washington on February 10, 11, and 12, 1986. Administrative

1 Appeals Judge William A. Harrison presided.

2 Appellant appeared by its attorney, Joseph E. Shickich.  
3 Respondent City of Bothell appeared by its attorney, Larry C. Martin.  
4 Respondent, Northcreek Associates appeared by its attorney, Donald E.  
5 Marcy. Reporter Gene Barker provided reporting services.

6 Witnesses were sworn and testified. Exhibits were examined. From  
7 testimony heard and exhibits examined, the Shorelines Hearings Board  
8 makes these

9 FINDINGS OF FACT

10 I

11 This case concerns the same subject matter as our earlier SAVE v.  
12 Bothell, The Koll Company, et al., SHB No. 82-29, et al. (1983); that  
13 is, development by the Koll Company of the former Vitulli Farm into a  
14 light industrial park. The site includes a portion of North Creek.

15 II

16 Our hearing in SHB No. 82-29, above, was conducted on April 18  
17 through 22 and September 7, 8 and 9, 1983. Our final Order, drawn  
18 from that hearing, adjudicated the propriety of shoreline permits  
19 granted by Bothell to the Koll Company.

20 III

21 Prior to, during, and after the hearing before us, the Koll  
22 Company was negotiating Hydraulics Project Approval with the  
23 Departments of Fisheries and Game. This approval, like the shoreline  
24 permits which we adjudicated, is necessary for relocating North Creek  
25 within the site, an important feature of the Koll proposal.

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IV

In February, 1983, Koll went to the Departments of Fisheries and Game with a diagram constituting their understanding of what might be an acceptable "buffer" zone along North Creek after its relocation. Departments of Fisheries and Game found the diagram to be acceptable. That is, if a buffer zone of the configuration shown on Koll's diagram were planted in riparian vegetation, it would be adequate to protect fish and wildlife associated with the Creek. This transpired prior to the commencement of our prior hearing. However, between the two segments of our prior hearing, in May, 1983, Departments of Fisheries and Game issued a hydraulics permit to Koll. This permit was grounded upon the agreed buffer diagram.

V

Koll did not offer the buffer diagram as evidence in the hearing of our prior case (SHB No. 82-29). The buffer diagram was offered in this hearing (SHB No. 85-39) as exhibit R-3. However, Koll did offer in our prior hearing a large site diagram (Exhibit R-26) which showed the buffer depicted by R-3. Koll also offered the May, 1983, hydraulics permit during the second segment of our prior hearing. In pertinent part, that permit provided:

The stream buffer shall average 100 feet on each lot and shall be planted and maintained in native vegetation.

VI

The agreed buffer diagram Exhibit (R-3) specifies that on certain lots the configuration of the buffer will extend from the stream

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landward in strips that border property boundaries or roadways. These portions of the buffer are known as "wings." For lot 9, which is before us in this review, the buffer averages 98.54 feet in width. Were the wings excluded from this computation, the buffer would average only 72.6 feet in width. However, the wings were understood and agreed to by Departments of Fisheries and Game in their issuance of the May, 1983, hydraulics permit. Moreover, those Departments also acknowledged the possibility of slight shifts in the channel of North Creek. Therefore, they also chose to emphasize the importance of a stream buffer "corridor" such that the lots on either side of the stream would together provide roughly 100 feet on each side of the stream, allowing that one side could be slightly less if the other side is slightly more. For lots on both sides of the stream (Nos. 9 and the opposite lots 7 and 8) the total square footage in Koll's buffer divided by the lineal footage of the stream yields an average buffer width of 101.38 feet. Despite the fact that the buffer width on lot 9 alone is a shade less than 100 feet (98.54 feet) it has not been shown to be materially different in its effect from a buffer of exactly 100 feet. Further, we find that this de minimis shortfall of 1.46 feet is compensated fully by a like or greater amount of buffer on the opposite lots 7 and 8 which join with lot 9 in forming a stream buffer corridor at this location.

## VII

Our final Order in the prior case (SHB No. 82-29) provided as follows with regard to the buffer:

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Finding of Fact IX

Stream Buffer. The shoreline permits before us contemplate that all development will be set back 50 feet from the ordinary high water mark of the relocated North Creek. The Hydraulics Permit subsequently issued by the Washington State Departments of Fisheries and Game, and apparently accepted by Koll, contains the following more stringent provisions which are necessary for the full protection of fish and game species on the site:

1. The stream buffer shall average 100 feet on each lot, and shall be planted and maintained in a native vegetation. (Emphasis added).

Conclusion of Law XVIII

The 50-foot buffer of vegetation along North Creek would not fully protect fish and game species on the site. For consistency with the policy of the Shoreline Management Act, RCW 90.58.020, the 100-foot buffer and related requirements of the Hydraulics Permit (Finding of Fact IX) should also be conditions of the shoreline permits. (Emphasis added).

ORDER

The shoreline permits granted by the City of Bothell to The Koll Company are reversed to the extent necessary to conform them with the four conditions set out in Conclusion of Law XXI. The permits are affirmed in all other respects. This matter is remanded to the City of Bothell for reissuance of the shoreline permits consistent with this Order.

One of the four conditions alluded to in that Order and set forth in Conclusion of Law XXI was:

"The stream buffer shall average 100 feet on each lot, and shall be planted and maintained in native vegetation."

This is the wording of the May, 1983, hydraulics permit.

Our final Order was entered on November 3, 1983.

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VIII

North Creek was not relocated pursuant to the May, 1983, hydraulics permit. That permit expired in December, 1983, at which time a new hydraulics permit was issued by Departments of Fisheries and Game. This, of course, was after our final Order. The new hydraulics permit stated, with regard to stream buffer:

North Creek shall be protected by a stream buffer setback as depicted on the North Creek realignment plans dated March, 1983, and on the stream setback buffer map conceptually agreed to in February, 1983, and formally approved on May 17, 1983. (Emphasis added).

The language underlined above refers to the original Koll diagram (Exhibit R-3) previously referred to in connection with the earlier, May, 1983, hydraulics permit. This language re-emphasizes the intent of Department of Fisheries and Game that hydraulic project approval be granted on the basis of the Koll buffer diagram, Exhibit R-3.

IX

On February 14, 1984, following our remand to Bothell in SHB No. 82-29, Bothell re-issued shoreline permits to Koll with this wording as to the stream buffer:

The stream buffer shall average 100 feet on each lot, and shall be planted and maintained in native vegetation. For clarification, the Board finds that to comply with this condition, North Creek shall be protected by a stream buffer setback as depicted on the North Creek realignment plans dated March, 1983 and on the stream setback buffer map conceptually agreed to in February, 1983 and formally approved on May 17, 1983. The stream buffer shall be planted and maintained in a native vegetation as approved by Department of Fisheries and Department of Game. (Emphasis added).

1 The underlined wording is drawn from the December, 1983, hydraulics  
2 permit. Hereafter, the shoreline permits re-issued by Bothell to Koll  
3 following our final Order of remand and containing this language shall  
4 be referred to as the "re-issued shoreline permit." The re-issued  
5 shoreline permit refers to two buffer diagrams in the language above,  
6 and establishes them as controlling. These are the North Creek  
7 realignment plans of March, 1983, (R-48 on this record) and the  
8 original Koll buffer diagram upon which hydraulic project approval was  
9 based (R-3 on this record). These two diagrams set forth the same  
10 stream buffer, and therefore merge to create a single standard under  
11 the re-issued shoreline permit.

12 X

13 Bothell mailed copies of its re-issued shoreline permit to this  
14 Board, Koll, SAVE and Department of Ecology under date of February 14,  
15 1984. These were received in due course a few days later. Members of  
16 SAVE were aware of the buffer language in the re-issued shoreline  
17 permit at this time, and in direct sequence, SAVE manifested its  
18 disagreement with that wording. SAVE did not commence a proceeding to  
19 review the buffer language in the re-issued shoreline permit for  
20 consistency with our final Order in SHB No. 82-29.

21 XI

22 In reliance upon the apparent decision by SAVE not to commence a  
23 review of the re-issued shoreline permit, Koll completed its purchase  
24 of the site (the entire Vitulli Farm) and began work to relocate the  
25 channel of North Creek.

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XII

Some 20 months after the re-issued shoreline permit, Koll sought and Bothell granted a shoreline substantial development for the first commercial buildings on the site (four warehouses) to be located on lot 9. Lot 9 is one of 30 such lots into which the Vitulli Farm was divided. The shoreline permit specified the same stream buffer for lot 9 as the re-issued shoreline permit which established the buffer for the greater site; except, however, the lot 9 shoreline permit authorized a small reduction (3,000 square feet) in one of the buffer wings with a corresponding square footage increase in the buffer adjacent to North Creek.

XIII

The shoreline permit for the warehouses on lot 9 was granted by Bothell on October 10, 1985. Appellant filed its request for review of that permit with this Board on November 18, 1985.

XIV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

This is a request for review of the lot 9 shoreline permit. Three issues are presented:

1) Whether SAVE timely challenged Bothell's re-issued shoreline permit, and whether SAVE was required to do so?

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2) Whether Bothell's re-issued shoreline permit complied with the final Order of this Board in SHB No. 82-29?

3) Whether the proposed development for lot 9 must comply with the Bothell re-issued shoreline permit and, if so, does it?

## II

Whether SAVE timely challenged Bothell's re-issued shoreline permit, and whether SAVE was required to do so? In this case, SAVE asserts that a disharmony exists between our final Order of remand in SHB No. 82-29 and Bothell's re-issued shoreline permit which followed from it. The thrust of SAVE's argument is that the stream buffer contemplated in our final Order does not allow consideration of the buffer "wings" made applicable by Bothell's re-issued shoreline permit. The following conclusions address whether this argument is placed timely before us.

## III

By way of background it is our practice, on review of a shoreline permit, to add conditions when the evidence shows that this is necessary and sufficient to conform the proposed development with the Shoreline Management Act, chapter 90.58 RCW, and the local shoreline marter program. Moreover, because our proceedings occur at the state level, we customarily remand such a case to local government with instructions to issue a new shoreline permit consistent with our Order which contains the added conditions. This practice has been sustained in San Juan County v. Natural Resources, 28 Wn.App. 796, 800 (1981). This practice places in the files of local government, where the

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1 public can easily inquire, a complete shoreline permit as modified  
2 following our review.

3 IV

4 The re-issuance of a shoreline permit pursuant to our Order is  
5 legally distinct, however, from the granting of that permit in the  
6 first place. The original grant of the permit is a deliberative act.  
7 The re-issuance of a shoreline permit pursuant to our Order is, by  
8 contrast, a clerical act. It is done at our direction and cannot  
9 diverge in any material way from our final Order without upsetting the  
10 process of adjudication provided by the proceedings before us.

11 V

12 The procedure and time limitation for requesting review of a  
13 shoreline permit when first granted is set forth at RCW 90.58.180 of  
14 the Act. Because of the fundamental difference between that  
15 deliberative grant of a shoreline permit and the clerical re-issuance  
16 of a shoreline permit, we conclude that RCW 90.58.180 does not apply  
17 to the re-issuance of a shoreline permit. The language of RCW  
18 90.58.180 allows review without limitation as to the issues, within  
19 our jurisdiction, which may be raised. After our final Order,  
20 however, the plenary challenge allowed by RCW 90.58.180 has been  
21 determined. Moreover, the 30-day limitation for raising a plenary  
22 challenge as specified within RCW 90.58.180 will have run, so that no  
23 further challenge may be commenced under that statutory section.  
24 Despite this, we hold that it is within our inherent power to accept a  
25 limited request for review on the sole issue of whether a shoreline

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1 permit re-issued pursuant to our final Order is consistent therewith.  
2 This is reasonably necessary to achieve our statutory objective of  
3 complete and final adjudication. See Foundation for the Handicapped  
4 v. DSHS, 97 Wn.2d 691, 698 (1982) and cases cited therein.

#### 5 VI

6 We now turn to the time limitation for bringing a request for  
7 review of the consistency of a re-issued shoreline permit with our  
8 final Order. Having concluded that RCW 90.58.180 does not govern this  
9 type of proceeding, we further conclude that the Act is silent on the  
10 question of a time limitation for commencing such a proceeding. We  
11 therefore turn for guidance to rules developed by the courts for  
12 review of administrative action under writ of certiorari. As set  
13 forth in Akada v. Park 12-01 Corporation, 103 Wn.2d 717 (1985), where  
14 no time limitation is provided by statute or rule, review should be  
15 sought "within a reasonable time after the act complained of has been  
16 done." A determination is then made by analogy as to what constitutes  
17 the appropriate time limitation.

#### 18 VII

19 Elsewhere under the Shoreline Act, an applicant can proceed with  
20 development 30 days after a shoreline permit is granted, provided that  
21 no request for review is filed here within that time. RCW  
22 90.58.180(1). This provides a fair opportunity for appeal coupled  
23 with certainty for the developer once the 30 days has run without  
24 appeal. Likewise, an applicant can proceed with development 30 days  
25 after our final Order affirming a shoreline permit, provided that no

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1 petition for review is filed in superior court. RCW 34.04.130. This  
2 also balances a fair opportunity to appeal with certainty that  
3 development can proceed where there is no appeal. In this case our  
4 final Order remanded shoreline permits for the addition of appropriate  
5 conditions. From this, concern arose over the consistency of the  
6 re-issued permits with our final Order. Having acknowledged that this  
7 concern can be heard upon further request for review, yet we cannot  
8 see justification for allowing such review to be commenced  
9 disproportionately later than the time limits set forth elsewhere for  
10 appeals. To the contrary, we deem that a reasonable time for  
11 requesting review of the consistency of a re-issued shoreline permit  
12 with our final Order is 30 days from the date the re-issued permit is  
13 received by Department of Ecology.<sup>1/</sup> This is the analogy which is  
14 most consistent with the rest of the Shoreline Act, and which we  
15 conclude is the time limitation applicable to raising this consistency  
16 issue in a proceeding before us.

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19  
20 <sup>1/</sup> Because this determination of a reasonable time is made by analogy  
21 we point out that the specific requirements of WAC 173-14-090  
22 implementing RCW 90.58.180(1) relating to requests for review of the  
23 initial grant, denial or rescission of a permit are not applicable.  
24 By the time of our final Order, the requirements of that rule should  
25 already have been met. The shoreline permit re-issued by local  
26 government pursuant to our final Order should be filed with Department  
27 of Ecology, however, to complete its shoreline permit files and place  
it on equal footing with local government.

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VIII :

In this case, the evidence shows that a copy of the re-issued permit was promptly filed with Department of Ecology, and that no request for review was brought by SAVE within 30 days thereafter. Moreover, the evidence shows SAVE's awareness within this time of the terms of the re-issued permit. We conclude that SAVE has not timely raised the issue of consistency between the re-issued shoreline permit and our final Order, that SAVE was required to do so, and that SAVE is therefore barred from doing so in this proceeding.

IX

Whether Bothell's re-issued shoreline permit complied with the final Order of this Board in SHB No. 82-29? Without retracting our conclusion that the issue is barred, we could conclude, in the alternative, that the shoreline permit re-issued by Bothell is consistent with our final Order. The wording of our final Order, drawn from the original hydraulics permit, is somewhat ambiguous in light of the conflicting interpretations offered by the parties in this case. Where words in a permit are ambiguous and where the permit was the product of negotiation, the intent of both the agency and applicant is relevant. ITT Rayonier v. Ecology, 91 Wn.2d 682, 686-687 (1978). In this case the original hydraulics permit was a product of negotiation between the Departments of Fisheries and Game on the one hand, and Koll on the other. The intent of the parties was to create a buffer as depicted in the diagram considered in the negotiations (Exhibit R-48 or Exhibit R-3 on this record). The configuration of

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1 this buffer included the "wings" described previously. In the expert  
2 opinion of Departments of Fisheries and Game this was adequate to  
3 protect fish and wildlife associated with North Creek. In reaching  
4 our final Order it was our purpose to preserve the buffer deemed  
5 adequate in the hydraulics permit. In adding the language which it  
6 did when re-issuing the shoreline permit, Bothell clarified this  
7 point, and complied with our final Order in SHB No. 82-29.

8 X

9 Whether the proposed development for lot 9 must comply with the  
10 Bothell re-issued shoreline permit and, if so, does it? We first  
11 conclude that the Bothell re-issued shoreline permit is the document  
12 which controls development. Although drawn at the direction of our  
13 final Order, the re-issued permit now controls. The stream buffer  
14 described within the re-issued shoreline permit and directed by our  
15 final Order is necessary to render relocation of North Creek  
16 consistent with the Shoreline Management Act. (See Conclusion of Law  
17 XVIII in SHB No. 82-29 set out at Finding of Fact VII above.) Now  
18 that North Creek is relocated, the buffer condition of the re-issued  
19 shoreline permit has become durable, and controls subsequent building  
20 proposals along the Creek on the site to which the re-issued permit  
21 applies, that is, the Vitulli Farm. It cannot be contravened without  
22 creating a contravention of the Shoreline Management Act. In the  
23 following conclusion we address the proposed development on lot 9 in  
24 this context.

XI

We have found that the shoreline permit for lot 9 does not coincide precisely with the buffer condition of the re-issued shoreline permit for relocating North Creek. However, the shifting of buffer area out of a "wing" and into the area adjacent to the Creek is, if anything, somewhat more protective of the Creek. We hold that where, as here, a durable condition such as the greater North Creek buffer exists in a prior shoreline permit, subsequent shoreline permits, such as that for lot 9, must be in substantial compliance with the prior, durable condition. That is the case here.<sup>2/</sup> We conclude that the proposed development for lot 9 must and does comply with the Bothell re-issued shoreline permit.

XII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

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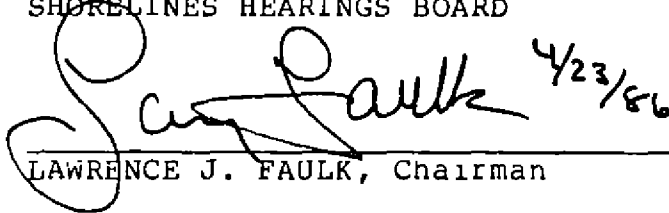
<sup>2/</sup> This conclusion is made in view of the buffer's purpose of protecting North Creek. For that reason it is most unlikely that shifting of buffer away from the Creek and into the wings would constitute substantial compliance with the Bothell re-issued shoreline permit.

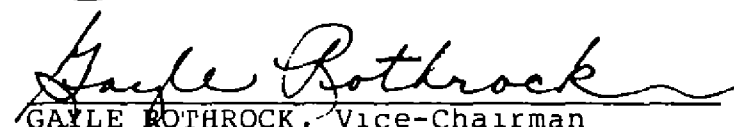
ORDER

The shoreline substantial development permit granted by the City of Bothell for development upon lot 9 is hereby affirmed.

DONE at Lacey, Washington this 25th day of April, 1986.

SHORELINES HEARINGS BOARD

 4/23/86  
LAWRENCE J. FAULK, Chairman

  
GAYLE ROTHROCK, Vice-Chairman

  
NANCY BURNETT, Member

  
RODNEY M. KERSLAKE, Member

Dissenting  
CYNTHIA SULLIVAN, Member

  
WILLIAM A. HARRISON  
Administrative Appeals Judge

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I Dissent.

  
CYNTHIA SULLIVAN, Member

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